

Avoiding Mistakes

Timely Depositing Salary Deferrals

Under Department of Labor Regulation 2510.3-102(b), participant contributions to 401(k) plans (employee salary deferrals) are required to be paid into the plan as soon as these assets can be reasonably segregated from employer assets, but in no event later than the 15th business day of the month following the month in which the participant contributions are withheld from compensation. The Labor Department has announced that the 15th business day rule is not a safe harbor and that in virtually all cases employers must fund employee contributions sooner.

In official examples accompanying the Labor Department regulations, companies with one payroll location are expected to make deposits within two business days. From discussions with other 401(k) plan practitioners and leading national pension attorneys, it is apparent this faster standard is being applied in Labor Department investigations.

Penalty for Late Deposits

Any violations identified by the Labor Department, including minor ones, will generally result in civil penalties being assessed against the employer. In cases that the Labor Department considers more severe, it will pursue criminal penalties against plan fiduciaries, including employers and plan trustees. In recent months, the Labor Department has stepped up its enforcement of these regulations.

Correction procedures are available for plans that have exceeded the "as soon as reasonably possible" deadline for depositing employee contributions into the trust fund. These include voluntarily restoring lost investment earnings and filing an excise tax return (IRS Form 5330).

Steps to Minimize Late Deferrals

For employers with in-house payroll departments, we strongly advise implementation of procedures to ensure employee salary deferrals are remitted to the plan custodian immediately after being withheld from employee. Employers using the services of a payroll outsourcing company should ensure that procedures are discussed, coordinated, and included in service contracts to ensure salary deferrals are remitted timely.

